

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: Digital Growth Experts Limited

Of: International House, 12 Constance Street, London E16 2DQ

1. The Information Commissioner ("Commissioner") has decided to issue Digital Growth Experts Limited ("DGE") with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is in relation to a serious contravention of Regulations 22 and 23 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. DGE, whose registered office is given above (Companies House Registration Number: 12373841) is the organisation stated in this notice to have transmitted unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
4. Regulation 22 of PECR states:

- “(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.
- (2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.
- (3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—
- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;
 - (b) the direct marketing is in respect of that person’s similar products and services only; and
 - (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.
- (4) A subscriber shall not permit his line to be used in contravention of paragraph (2).”

5. Regulation 23 of PECR states that "A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail –
 - (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed;
 - (b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided
 - (c) where that electronic mail would contravene regulation 7 of the Electronic Commerce (EC Directive) Regulations 2002; or
 - (d) where that electronic mail encourages recipients to visit websites which contravene that regulation."
6. Section 11(3) of the DPA defines "direct marketing" as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals". This definition also applies for the purposes of PECR (see regulation 2(2)).
7. Consent is defined in the European Directive 95/46/EC as "*any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed*".
8. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".

9. A “subscriber” is defined in regulation 2(1) of PECR as “a person who is a party to a contract with a provider of public electronic communications services for the supply of such services”.
10. “Electronic mail” is defined in regulation 2(1) of PECR as “any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient’s terminal equipment until it is collected by the recipient and includes messages sent using a short message service”.
11. PECR implements European legislation (Directive 2002/58/EC) aimed at the protection of the individual’s fundamental right to privacy in the electronic communications sector. PECR was amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches PECR so as to give effect to the Directives.
12. The DPA contains enforcement provisions at Part V which are exercisable by the Commissioner. Those provisions are modified and extended for the purposes of PECR by Schedule 1 PECR.
13. Section 40(1)(a) of the DPA (as extended and modified by PECR) provides that if the Commissioner is satisfied that a person has contravened or is contravening any of the requirements of the Regulations, he may serve him with an Enforcement Notice requiring him to take within such time as may be specified in the Notice, or to refrain from taking after such time as may be so specified, such steps as are so specified.
14. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

The contravention

15. The Commissioner finds that DGE contravened regulations 22 and 23 of PECR.
16. The Commissioner finds that the contravention was as follows:
17. The Commissioner finds that between 29 February 2020 and 30 April 2020 there were 16,190 direct marketing text messages received by subscribers. The Commissioner finds that DGE transmitted the direct marketing messages sent, contrary to regulation 22 of PECR.
18. The Commissioner is satisfied that the contravention could have been higher, with a total of 17,241 text messages being sent over the relevant time.
19. DGE, as the sender of the direct marketing, is required to ensure that it is acting in compliance with the requirements of regulation 22 of PECR, and to ensure that valid consent to send those messages had been acquired.
20. In this instance DGE have been unable to evidence any such consent, instead providing unclear and inconsistent explanations for its practices and the means by which it obtains the data used for its direct marketing. Indeed, from the information provided, and as far as the Commissioner can determine, it appears that DGE has relied on data scraped from an online marketplace account belonging to its Director, which he had operated since 2003, albeit claiming that the data used was obtained only over the previous 24 months. There is no evidence that valid consent had been obtained from any of the individuals whose

data had been used in this way, or that any of the individuals had any previous relationship with DGE whatsoever.

21. DGE also used data obtained via social media advertisements which purported to offer free samples of a product to individuals, and then automatically opted them in to receiving direct marketing. From the evidence provided, it does not appear that individuals were advised that their data would be used for this purpose, nor were individuals given a simple means of refusing the use of their contact details for this purpose.
22. Neither of the above methods of data collection constitutes adequate means of obtaining valid consent, and nor would DGE be able to avail itself to regulation 22(3) PECR (the "soft opt-in").
23. DGE stated that some of its marketing texts were sent to individuals who had previously expressed an interest in 'eBay' offers on the Director's account page. It is however, in the Commissioner's view, simply not possible that individuals whose data has been held on the Director's own 'eBay' account since 2003, or even those who may have expressed an interest in unrelated products on this account within the previous 24 months, could have provided valid consent to receive direct marketing text messages from DGE in relation to hand sanitiser many years later. Indeed, it is unlikely that such individuals would have any knowledge of DGE, which is likely not to have even been incorporated at the time they expressed an interest in offers on the Director's own page. Rather, it appears to the Commissioner that this data has been harvested from records of past auctions involving the Director regarding unrelated products, and used by DGE for the purposes of reaching as many people as possible in relation to its own hand sanitiser marketing campaign.

24. The Commissioner is further satisfied that, in any event, DGE cannot rely on the 'soft opt-in' exemption provided by Regulation 22(3) PECR for the purposes of the messages sent to individuals with whom the Director of DGE has a prior transaction history. The soft opt-in exemption firstly requires that the person sending or instigating the electronic mail, i.e. DGE, had obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient. There has been no evidence provided that any of the recipients, some of whom the Director has confirmed would have provided details to him years earlier, had entered into a sale, or negotiations for a sale, with DGE; regulation 22(3) PECR therefore cannot apply.
25. In short, DGE has provided no evidence in respect of this data set to support a reliance on Regulation 22(3) PECR, or any evidence to demonstrate valid consent whatsoever.
26. In terms of those individuals who had signed up to receive a sample of hand sanitiser through social media platforms, DGE initially provided some unspecific information as to how data would be collected. It has since been confirmed that individuals would enter their name and telephone number through one of these lead generation type adverts and would be required to agree to two privacy policies (Facebook's and that of 'Zoono.io'). The individual would then receive a text to their phone with a voucher code which they would need to separately input on 'Zoono.io'; they would pay postage and receive their free sample. However, upon entry of their details at the data collection stage, and whether or not individuals chose to redeem the voucher code, individuals were automatically, and without notice, opted in to receive direct marketing messages from DGE, with multiple messages potentially being sent to them.

27. Such means of obtaining consent cannot be valid, since the 'consent' being relied on cannot, at the very least, be said to have been freely given; nor can individuals be said to have been given a genuine choice as to whether or not they would wish to receive direct marketing when signing up to a free sample of the hand sanitiser.
28. Furthermore, the 'soft opt-in' exemption cannot be relied on for these individuals since the act of applying for a free sample cannot be said to be a 'sale' or 'negotiation of a sale'. In any event, it appears that DGE would send marketing to all individuals who provided their details in this way, and not just those who may have chosen to redeem the voucher for the free sample. Such subsequent direct marketing would fail to meet the criteria of Regulation 22(3)(a) PECR.
29. In addition, from the evidence provided it is clear that the individuals had not, at the point their data was collected, been given a simple means of refusing the use of their contact details for direct marketing; accordingly, DGE's direct marketing would also fail to meet the criteria of Regulation 22(3)(c) PECR.
30. Again, DGE has been unable to demonstrate any evidence of consent to send direct marketing messages to those individuals whose data was obtained via social media offers, nor can it rely on Regulation 22(3) PECR.
31. The Commissioner further notes that the messages do not make clear that they are being sent by and on behalf of DGE, rather they either do not reference a sender at all or alternatively refer to 'Zoono' which is a product name and is not a registered trading name of DGE. DGE obtained permission to market Zoono products from Zoono Holdings Limited, a separate and distinct entity.

32. It is also apparent that a large proportion of the messages received by subscribers did not contain an option for recipients to opt-out of future marketing messages.
33. The Commissioner is satisfied from the evidence she has seen that DGE has contravened Regulation 22 PECR for the 16,190 direct marketing messages received by subscribers
34. Furthermore, the Commissioner is satisfied that the actions of DGE have contravened regulation 23 PECR.
35. The Commissioner has considered, as she is required to do under section 40(2) of the DPA (as extended and modified by the Regulations) when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage. The Commissioner has decided that it is unlikely that actual damage has been caused in this instance.
36. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of her powers under section 40 of the DPA, she requires DGE to take the steps specified in Annex 1 of this Notice.**

Right of Appeal

37. There is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber. Information about appeals is set out in the attached Annex 2.

Dated the 22nd day of September 2020

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

TERMS OF THE ENFORCEMENT NOTICE

DGE shall within 30 days of the date of this notice:

- Except in the circumstances referred to in paragraph (3) of regulation 22 of PECR, neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified DGE that he clearly and specially consents for the time being to such communications being sent by, or at the instigation of, DGE.
- Furthermore, DGE shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail:
 - (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed;
 - (b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided
 - (c) where that electronic mail would contravene regulation 7 of the Electronic Commerce (EC Directive) Regulations 2002; or
 - (d) where that electronic mail encourages recipients to visit websites which contravene that regulation."

ANNEX 2

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the "Tribunal") against the notice.
2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or
 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0300 123 4504

Email: grc@justice.gov.uk

- The notice of appeal should be served on the Tribunal within 28 days of the date on which the enforcement notice was sent
4. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).